MOTION FILED

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IN THE

Supreme Court of the United States

No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS MAGAZINE, INC. and LIAISON NEWS LETTER, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF

ERNEST ANGELL
IRWIN KARP
EPHRAIM S. LONDON
HORACE S. MANGES
HARRIET F. PILPEL
DEAN LOUIS H. POLLAK
WHITNEY NORTH SEYMOUR
HARRISON TWEED
BETHUEL M. WEBSTER

AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR REHEARING

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AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR REHEARING

The above mentioned lawyers hereby respectfully move for leave to file the brief appended hereto as *amici curiae* in support of the motion for a rehearing herein.

The consent of the attorney for Petitioners to the filing of this brief has been obtained. The Solicitor General (through Ralph Spritzer, Esq.) has stated to counsel making this motion that he would file no objection thereto.

The lawyers on behalf of whom this motion is made are seriously interested in the point made by this brief, namely, that the standard of obscenity established by this Court in *Roth* v. *United States* and *Jacobellis* v. *Ohio* did not give to the petitioners in this case "fair notice", as required by the First and Fourteenth Amendments—or any notice—that circumstances of advertising, selling or promoting books or the nature of the publisher's business were factors that might render such books "obscene" under 18 U.S.C. Sec. 1461 and therefore that any books sold *before* the decision of this Court herein on March 21, 1966 should not be judged by such additional factors. It is believed that the brief hereto appended presents in broader perspective the dangerous impact of this portion of the decision of this Court than will be presented by the parties themselves on this motion for rehearing.

WHEREFORE, it is urged that the abovementioned Movants be granted leave to file herein the appended brief as *amici curiae*.

Respectfully submitted,

ERNEST ANGELL,
Attorney for Ernest Angell, Irwin Karp, Ephraim S. London, Horace S. Manges, Harriet F. Pilpel, Whitney North Seymour, Harrison Tweed and Bethuel M. Webster, all of New York, N. Y., and Dean Louis H. Pollak, of New Haven, Conn.,
1 East 44th Street,
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AS *AMICI CURIAE*

This brief is submitted by the above mentioned lawyers as *amici curiae*, in support of the Petition for Rehearing herein. The undersigned have no connection with the petitioners and are motivated in taking the position set forth herein solely in the interest of opposing what seems to them to be an unjust retroactive application of criminal law.

The Court ruled on March 21, 1966 that although petitioners' publications may not "themselves be adjudged

obscene in the abstract", they can nonetheless be held obscene because of factors other than their contents—to wit, the circumstances of their sale, advertising and promotion.

This brief is not addressed to the question of whether these additional factors should be applied in determining whether works published or sold *after* March 21, 1966 are obscene (nor is it addressed to the question of whether the publications themselves are obscene or not). This brief is submitted because we believe that these additional factors should not be considered in determining whether the publications which petitioners sold *before* March 21, 1966 were obscene. We believe that from the moment of its formulation on June 24, 1957 until the morning of March 21, 1966, the standard for determining obscenity, established in *Roth* v. *United States,* 354 U. S. 476 (1957), did not give "fair notice", as required by the First and Fourteenth Amendments (*Winters* v. *New York,* 333 U. S. 507, 509 (1948))—or any notice—that circumstances of advertising, selling or promoting a book or the nature of the publisher's business were factors that might render it "obscene" under 18 U.S.C. Sec. 1461.

We believe that Mr. Justice Brennan's opinion in *Roth* v. *United States* established the standard for determining the issue of obscenity in prosecutions under all federal and state statutes. Those who have had occasion to study the *Roth* opinions and the subsequent opinions of this Court explaining the *Roth* standard, culminating in Mr. Justice Brennan's opinion in *Jacobellis* v. *Ohio,* 378 U. S. 184 (1964), considered that these explanations of such standard did not give the slightest inkling that circumstances of selling, advertising or promoting or the nature of the publisher's business would have any bearing on

the issue of obscenity. On the contrary, from *Roth* to *Jacobellis*, the careful explanations of the standard in Mr. Justice Brennan's opinions served to emphasize that the question of obscenity involved only the *contents* of the work on trial. Its three-element test focused entirely on the contents of the work—whether *its* dominant theme appeals to prurient interest; whether *its* descriptions so exceed the bounds of candor as to be patently offensive; whether *it* is utterly without social value.

In *Roth*, the Court said it is "vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for *material* which does not treat sex in a manner appealing to prurient interest" (354 U. S. at p. 488). And the standard was stated unequivocally—"obscene *material* is *material* which deals with sex in a manner appealing to prurient interest" (p. 487). That this was *the* standard, the opinion leaves no doubt. It was identified as the "substituted standard [which] provides safeguards adequate to withstand the charge of constitutional infirmity" (p. 489). It was the "proper standard for judging obscenity * * * giv[ing] adequate warning of the conduct proscribed * * *" (491). (Emphasis ours)

This concept that the standard adopted in *Roth* was *the* test for determining the "constitutional issue" of obscenity and that the *Roth* standard applied solely to the contents of a work was confirmed by Mr. Justice Brennan's opinion in *Jacobellis* v. *Ohio*, 378 U. S. 184, 191. Mr. Justice Brennan said:

> "The question of the *proper* standard for making this determination has been the subject of much discussion and controversy since our decision in *Roth* seven years ago. Recognizing that *the test*

> *for obscenity enunciated there*—'whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest,' 354 U. S. at 489 1 L ed. 2d at 1509—is not perfect, we think any substitute would raise equally difficult problems and"

he concluded:

> "we therefore adhere to *that standard.*" (p. 191) (Emphasis ours).

We submit that this reaffirmation of the *Roth* standard on June 22, 1964—as *the* test of obscenity—did not give "fair notice", or any notice, that the "constitutional issue" of obscenity would turn on anything other than the contents of a work. This reaffirmation gave no notice that a work which was not *per se* obscene under the standard set forth on page 191 of volume 378 of the United States Reports, could nonetheless be judged obscene if (as the majority now holds):

> it was "openly advertised to appeal to the erotic interests of * * * customers"; or
>
> "if it was originated or sold as stock in trade of the sordid business of pandering"; or
>
> if "The leer of the sensualist also permeate[d] the advertising".

However, there is another circumstance which led the petitioners, prior to March 21, 1966. to believe that circumstances of selling, advertising and promotion (and indeed "pandering"), were irrelevant under the *Roth* standard. For, the view that such circumstances should be considered was set forth in the *dissenting* opinion of Chief

Justice Warren, in *Jacobellis* v. *Ohio*, 378 U. S. 184, 201. He said:

> "In my opinion, the use to which various materials are put—not just the words and pictures themselves—must be considered in determining whether or not the materials are obscene."

And, in support of this proposition, he cited, in a footnote, that advertisements for the motion picture on trial:

> "In the instant case, for example, the advertisements published to induce the public to view the motion picture provide some evidence of the film's dominant theme. * * *"

Mr. Justice Brennan's opinion in no way approved these factors, or made room for them in the *Roth* standard. Moreover, Chief Justice Warren had previously expressed the same view in a *concurring* opinion in *Roth*; and there Mr. Justice Brennan's opinion for the majority in no wise recognized or accepted that view as part of the *Roth* standard. There, Chief Justice Warren said:

> "It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting." (p. 495)

We submit that it was impossible for petitioners (or even attorneys experienced in this field) to know or predict, prior to March 21, 1966, that so drastically different an approach to the definition of obscenity—embodied in a concurring opinion in one case and in a dissenting

opinion in the most recent authoritative case—would now emerge as an additional and heretofore *undisclosed* element of the *Roth* standard.

In *Winters* v. *New York,* 333 U. S. 507, 509 (1948), this Court held that under the First and Fourteenth Amendments a "statute limiting freedom of expression" must "give fair notice of what acts will be punished * * *." This principle, as the Court has affirmed in many decisions since, is essential to the preservation of First Amendment protection for freedom of expression. Certainly the principle must apply to the *Roth* standard, for it is, beyond doubt, a part of every federal and state statute punishing obscenity.

In *Bouie* v. *City of Columbia,* 378 U. S. 347 (1964), this Court held that

> "when [an] unforeseeable [judicial] construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." *Id,* at 354-355.

In *James* v. *United States,* 366 U. S. 213 (1961), it was held that conduct consistent with the Court's prior interpretation of a criminal statute could not be the basis for a conviction under the statute as subsequently construed. The Court held that the new interpretation had to be established "in a manner that will not prejudice those who might have relied on [the old one]." 366 U. S. at 221, 242.

In *Smith* v. *California,* 361 U. S. 147 (1959), Mr. Justice Brennan stated:

> "stricter standards of permissible statutory vagueness may be applied to a statute having a poten-

tially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." (p. 151).

We believe that to sustain Petitioners' conviction in this case on the basis of their advertising, selling or promotion—or the nature of their "business"—would violate the letter, and more important, the spirit of *Winters, Smith* and *Bouie.*

If advertising, selling and promoting, or the nature of a publisher's business, were to be considered in determining the "constitutional issue" of obscenity prior to March 21, 1966, Petitioners were entitled to "fair notice" of that fact. In our opinion, the pronouncements of the *Roth* standard in *Roth* and *Jacobellis* did not give them such notice.

We urge that the Petition for Rehearing be granted and that the issue of whether the publications ***in this case*** are obscene or not, be determined solely on the basis of their contents.

Respectfully submitted,

ERNEST ANGELL,
Attorney for Ernest Angell, Irwin Karp, Ephraim S. London, Horace S. Manges, Harriet F. Pilpel, Whitney North Seymour, Harrison Tweed and Bethuel M. Webster, all of New York, N. Y., and Dean Louis H. Pollak, of New Haven, Conn., *Amici Curiae*